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IN THE

Supreme Court of the United States

OCTOBER TERM 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHRISTIAN LEGAL SOCIETY, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., AND JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether public school officials may prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other students groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

This question arises under the Equal Access Act, 20 U.S.C. §§ 4071-4074, and in the alternative, under the Speech and Religion Clauses of the First Amendment.

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PRESBYTERIAN CHURCH (U.S.A.),
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The amici joining in this brief represent more than eighty million Americans. These amici are religious organizations that accept this Court's decisions prohibiting government-sponsored prayer in the public schools. Three of these amici have consistently opposed constitutional amendments that would have permitted school sponsored prayer. None of these amici have supported such amendments.

Each of these amici support the principles of the Equal Access Act. They saw that the Act was not an attempt to evade this Court's decisions, but rather an attempt to remove state-imposed obstacles to the speech and religious exercise of students, extending to high schools the sound principles of *Widmar v. Vincent*, 454 U.S. 263 (1981).

After the Equal Access Act was adopted, all but one of these amici joined in an unusual work of clarification and reconciliation, brought about by the late John Baker, General Counsel of the Baptist Joint Committee. Mr. Baker convened experts from organizations that had favored the Act and from organizations that had opposed it. Together, they negotiated a set of Guidelines for implementation of the Act.

Because of their long involvement in the enactment and implementation of the Equal Access Act, these amici bring expertise and experience to the case. They have joined in this brief because the positions taken by Westside High School threaten to make the Act a dead letter. A description of the individual amici follows.

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference, National Baptist Convention of America; National Baptist Convention, U.S.A.; North American Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These constituent bodies have a total membership of approximately thirty million. This brief reflects the traditional Baptist commitment to religious liberty and its political corollary of church-state separation. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Christian Legal Society is a non-profit, professional association of 4,000 judges, attorneys, law professors, and law students, founded in 1961. The Society receives many complaints from high school students who have been denied their rights to religious speech and exercise in the public schools. As a result of such complaints, the Society has been active in the controversy over equal access from the beginning. This brief reflects the Society's concern for the appropriate accommodation of religion and the protection of the religious speech rights of public high school students.

The Church of Jesus Christ of Latter-day Saints (also known as the Mormon Church) has approximately 4 million members in the United States. The Church firmly supports the principles of religious freedom embodied in the Equal Access Act.

The National Association of Evangelicals is a nonprofit association of evangelical Christian organizations, colleges, and universities, as well as some 50,000 churches from 74 denominations. The Association serves a constituency of approximately fifteen million people.

The National Council of Churches of Christ in the U.S.A. is a community of communions composed of thirty-two religious bodies having over forty million constituents in the United States. It is commonly known as the National Council of Churches. Its public positions are based on policies adopted by its Governing Board, composed of about two hundred fifty members selected by the member denominations in proportion to their size and support of the Council.

James E. Andrews, as Stated Clerk of the General Assembly, is the continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. This brief does not purport to reflect the views of all Presbyterians. The brief is based on a comprehensive policy statement on religious liberty, adopted by the General Assembly. The policy statement

specifically opposes any form of government sponsorship for religious observance, and specifically endorses the equal access rights of voluntary student religious clubs.

Through their counsel, the parties have given consent to the filing of this brief.

SUMMARY OF ARGUMENT

This case is one of many similar controversies arising over a period of many years at public schools throughout the nation. The persistent issue arises from widespread misunderstanding of this Court's decisions forbidding government-sponsored prayer in the public schools. Some educators have come to believe that all religious speech must be extirpated from the schools. Others will permit religious speech by individual students, but forbid students to meet as a group to discuss religion.

These educators have failed to comprehend the distinction between speech by the school and speech by the students—between government sponsorship of religion and government toleration of religious exercise. In their zeal to enforce the Establishment Clause, they have trampled on the Free Speech and Free Exercise Clauses. They have distinguished away this Court's clarifying decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), and they now seek to eviscerate an Act of Congress.

If this Court adopts Westside High School's interpretation of the Equal Access Act, the Act will become a dead letter. WHS proposes judicial deference to such unreviewable administrative discretion that compliance with the Act would for all practical purposes be voluntary.

Of course not all local school officials are hostile to the Equal Access Act. And some who appear hostile are honestly trying to comply with what they understand to be the mandate of this Court's decisions. But this case shows that at least some local school officials fundamentally reject each and every premise on which Congress acted. This Court should not entrust broad statutory discretion to officials who are so hostile to the statute.

Rather, this Court should correct the misunderstanding of its own decisions and vindicate the authority of Congress.

Congress enacted an objective statutory test to trigger application of the Equal Access Act. If one noncurriculum related student group is allowed to meet, other groups must be allowed to meet as well. Congress chose this objective test because it feared evasion of the Act. For this objective test to serve its purpose, "noncurriculum related" must be understood in its common and objective sense. Thus the sponsors explained that curriculum related groups are those groups that are directly related to a particular course, such as the French club. WHS would evade the Act by claiming discretion so broad that it could designate any club as curriculum related.

Enforcing the Equal Access Act at WHS will not violate the Establishment Clause. WHS has artifically created an Establishment Clause issue by insisting that it must sponsor every group that meets in the school, and that it must suppress every group it does not sponsor. This position ignores the facts, the Act, and the case law. The plaintiff students do not seek sponsorship; they seek only the opportunity to meet on a regular basis. The Act expressly provides that WHS cannot sponsor a religious group. And this Court has held that official recognition of a student group is not sponsorship, but rather a constitutional entitlement. *Healy v. James*, 408 U.S. 169, 182-84 (1972). If plaintiff's club simply meets without sponsorship, as the Act provides, the Establishment Clause issue disappears.

Plaintiffs also have valid constitutional claims, although it is unnecessary to decide them. WHS's policies violate plaintiffs' right to speak and to associate for purposes of speech. The school is a traditional forum for its students and faculty. This is something less than a traditional *public* forum, but a great deal more than a limited public forum in which the right to speak depends on the intent

of the school board. Schools are peculiarly the marketplace of ideas, and they are inherently a forum for quiet discussion.

Plaintiffs' club is entitled to meet even if the school is not characterized as a forum. The students are entitled to be at the school, and they do not surrender their rights at the schoolhouse door. The right to speak individually, or to meet informally and irregularly, is not a substitute for the right to meet as an organized group, guaranteed by the constitutional right of association. This right can be denied only for a substantial educational reason. WHS's misunderstanding of the Establishment Clause is not such a reason.

Finally, WHS's policy violates the Free Exercise Clause. Religious speech is a part of free exercise, singled out for the highest level of First Amendment protection. The right of religious groups to meet is also part of the right to free exercise. And WHS's policy is hostile to religion, violating the duty of neutrality imposed by both religion clauses.

ARGUMENT

I. WESTSIDE HIGH SCHOOL HAS A LIMITED OPEN FORUM AS THAT TERM IS DEFINED IN THE EQUAL ACCESS ACT. THE SCHOOL'S CONTRARY INTERPRETATION WOULD EFFECTIVELY REPEAL THE ACT.

A. The Congressional Purpose Was to End a Pattern of Content Discrimination Against Student Religious Speech.

The Congressional Committee that recommended the Equal Access Act found a persistent pattern of discrimination against religious speech by students. The Senate Judiciary Committee found:

> Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity. Like the judges of the district court in *Widmar*, they

> erroneously believe that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted. Generally, those administrators act not from malevolence toward religion but from ignorance of the law and erroneous legal advice. A primary source of their confusion has been the lower Federal courts.

Equal Access Act, Report of the Senate Comm. on the Judiciary on S. 1059, Senate Report No. 98-357 at 6 (reprinted in U.S. Code Cong. & Ad. News, 98th Cong., 2d Sess. at 2348 (1984). The Committee reported many cases of discrimination against student religious speech. *Id.* at 11-18. The Committee found that many schools prevented religious groups from meeting, and that some schools even tried to prevent individual students from discussing religion in the halls or in the parking lot, or from saying grace over their meal in the cafeteria. *Id.* at 11-12, 16-18. The House Committee made similar but less detailed findings. Equal Access Act, Report of the House Comm. on Education and Labor on H.R. 5345, House Report No. 98-710, at 3-4.

It was this pattern of discrimination by local school boards that made the Equal Access Act necessary. To be sure, the Act is not limited to religious speech. The Act treats the pattern of discrimination against religious speech as a special case of content discrimination. When the Act applies, it protects religious and secular speech alike.

But in deciding when the Act applies, courts must interpret it in a way that solves the problem Congress was trying to solve. "It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 (1950).

The evil to be remedied is clearly identified in the Committee reports. Congress found that many school boards, left to choose a course through conflicting legal

advice and local pressure groups, would discriminate against religious speech. If local school boards have unlimited discretion to decide whether the Act applies, that discrimination will continue. As the Court of Appeals correctly held, broad discretion in the school boards would lead to "exactly the result that Congress sought to prohibit." 867 F.2d at 1078.

The statutory definition of "limited open forum" must be read in light of the Congressional findings and purpose. WHS tries to equate the statutory standard with the constitutional standard, even to the point of falsely claiming that "Congress twice used the term of art 'limited public forum.'" Brief of Petitioners at 59-60 n.24. This misquotes the statute. Congress avoided the term of art, presumably deliberately, and used its own term with its own definition. Thus, a statutory "limited *open* forum" is emphatically not the same as a constitutional "limited *public* forum." Rather, the statutory "limited open forum" is expressly defined in 20 U.S.C. § 4071(b):

> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

This definition makes the existence of a statutory forum depend on an objective standard—one or more noncurriculum related student groups. Unlike this Court's definition of a constitutional limited forum, a statutory forum does not depend on the intent of the school board. The judicial inquiry under the statute is into the existence of a single noncurriculum related group, not into the school board's intent.

The statutory definition is sweeping as well as objective. The most striking thing about the definition is the phrase "one or more"—a single noncurriculum related group creates a statutory forum. This part of the definition also goes well beyond this Court's cases on constitutional limited forums.

This sweeping and objective standard can be understood only as a remedial measure to prevent local school boards from continuing the content discrimination that Congress sought to end. The standard is objective and sweeping because its drafters feared evasion and resistance. Senator Leahy, who together with Senator Hatfield drafted the final language of the bill, explained that the concept of the limited open forum is "the very heart of the bill." 130 Cong. Rec. S 8341 (daily ed. June 27, 1984). He went on to say that the limited open forum "should be triggered by what a school does, not by what it says." *Id.* Without the objective standard of a single noncurriculum related group, he feared that schools could avoid the Act with a resolution declaring a closed forum, and then "consider any student group wanting to meet on school premises during noninstructional time on a case-by-case basis." *Id.* WHS's policy fits Leahy's prediction. WHS says that nothing can meet without school sponsorship and a relationship to the curriculum, and then it decides which groups can meet: service clubs are in, scuba diving is in, religion is out. The remedial purpose of the statute is wholly defeated if courts are too deferential to local school boards on the question of which groups are curriculum related.

The explanations of other sponsoring Senators are fully consistent with the definition's remedial purpose. Senator Hatfield, the principal Senate sponsor, offered this explanation:

> [I]n a number of schools, students in a class of Spanish or French will form a French club or a Spanish club where they get together to talk nothing but that language, to get conversational proficiency. We are recognizing that as really a kind of extension of the classroom. That is the kind of category of clubs that we are trying to incorporate as curriculum related." *Id.* at S 8342.

The French club is related to the curriculum in the sense that it directly serves a particular course that is offered for credit as part of the ordinary curriculum.

That is what Hatfield appears to have meant by "an extension of the classroom." Brief of Petitioners at 72. Senator Dole, another sponsor, offered the example of "extracurricular field trips taken by a science class" as curriculululum related, and he said that the limited open forum included "those student group meetings that are not *directly* related to the school's curriculum." *Id.* at S 8362 (emphasis added). The need for a direct link to curriculum is also suggested by the statutory definition of "meeting": an activity of a student group that is not "directly related to the school curriculum." 20 U.S.C. § 4072(3). WHS claims that all its clubs are "an extension of the classroom," Brief of Petitioners at 72, but it ignores the illustrations that give meaning to the phrase.

The sponsors' explanations of "curriculum related" fit the common sense understanding of curriculum, the sense in which the word would be used by legislators who are not educational theorists. Their explanations are consistent with the common distinctions among "curricular," "co-curricular," and "extra-curricular," distinctions that WHS would obliterate. Even WHS occasionally slips into more sensible usage, when it says that curriculum is "*part of* the 'total learning experience,'" Brief of Petitioners at 20 (emphasis added), and when it distinguishes "the School's curriculum" from "its overall program." *Id.* at 15. Of course extra-curricular activities are educational, useful, and related to the total learning experience. But that does not make them part of the curriculum in ordinary speech or in the meaning of the Equal Access Act.

Following Senator Hatfield's initial explanation, Senator Gorton skillfully cross-examined him about the meaning of curriculum related. In response to this unfriendly interrogation, Hatfield predicted that school board lawyers would find ways to evade the statute: "I cannot readily conceive of a criterion that could be used at this time to establish [a chess club] as a curriculum related activity. I am not saying it could not be, because as long

as you have lawyers, they can find ways of doing things one way or another." 130 Cong. Rec. at S 8342.

WHS seizes on this prediction about chess clubs, stopping its quotation just before Hatfield's despairing description of lawyers. Brief of Petitioners at 65. And of course WHS claims what Hatfield could not readily conceive of—that its chess club is curriculum related.

This same interrogation produced Hatfield's statement that the statute would not limit school board discretion to define what is curriculum related. *Id.* at 64. The only meaning of this statement consistent with the purpose of the statute is entirely uncontroversial: the Act does not interfere with local control of curriculum. The Act does not speak to the meaning of "curriculum related" for any purpose other than determining the Act's applicability. The Act does not control the school board's theory of curriculum; the board can continue to teach anything it wants, to sponsor any clubs it wants, and to consider them part of the curriculum if it wants.

But WHS cannot apply its infinitely elastic concepts of curriculum to the interpretation of a federal statute. Gorton's cross-examination attempted to apply Hatfield's answer about local control to the question of when the statute applies, and this effort led to Hatfield's statement that chess clubs are not curriculum related but that a clever lawyer might seek to make them so. Gorton was trying to make Hatfield explain the statute in a way that would destroy it. The whole point of the statute was to restrict the discretion of local school boards on one narrow but important issue—the recognition of voluntary student groups.

One ambiguous answer to a hostile question cannot control unambiguous evidence of Congressional purpose. The issue need not depend on speculation about Hatfield's state of mind, or on any preference for one snippet of floor debate over another. The issue is more reliably resolved by considering the evil the statute was designed to cure, the role of the definition of "limited open form"

in curing that evil, and the meaning of "noncurriculum related" necessary to cure that evil. The entire purpose of the statute depends on a narrow definition of curriculum related, committed in the first instance to local school boards but subject to substantial judicial review in light of the statutory purpose. A sweeping and largely unreviewable discretion, committed to the officials whose behavior Congress was trying to control, would make the statute nugatory.

After the statute was enacted, a very broad set of interested organizations agreed that "curriculum related" requires a direct relationship to curriculum. In their carefully negotiated Guidelines on the Act, the groups agreed as follows:

> A noncurriculum related student group is a group or club which is interested in a subject matter *not directly related to the school curriculum.* The math club, the Spanish club, the drama club and athletic teams would normally be curriculum related. A religious club, political club or *service club* would be considered noncurriculum related.

130 Cong. Record S 14,475 (daily ed. Oct. 11, 1984) (emphasis added).

Of course these Guidelines are not part of the legislative history. But they were negotiated by the American Association of School Administrators, the National Education Association, the American Civil Liberties Union, and several religious groups, and accepted by the American Federation of Teachers, Americans United for Separation of Church and State, and People for the American Way. All but one of the amici joining in this brief subscribed to these Guidelines, as did many of the amici now supporting WHS. Senator Hatfield inserted these Guidelines into the Congressional Record, explaining that supporters and opponents of the Act had at least been able to agree on what the Act meant.

The broad acceptance of these Guidelines by educational associations indicates the unreasonableness of WHS's

claim that its several service clubs are curriculum related. WHS also claims that its chess club is curriculum related, even though the chess club was one of the most commonly offered Congressional examples of a club that is not curriculum related. Similarly, WHS claims that its scuba diving club is curriculum related, even though there is no course in scuba diving and the club is both attended and taught by outsiders who are neither students nor faculty. J.A. 167-68 (Tr. 174); J.A. 175 (Tr. 185-86); J.A. 236-39 (Tr. 282-85).

If the Act does not apply to WHS, it is hard to imagine a school where the Act would apply. If WHS had political clubs, it would say that they are related to courses in social studies, government, and sociology. There is no club that cannot be related to the curriculum with sufficient imagination. As Senator Hatfield said, "as long as you have lawyers, they can find ways of doing things one way or another." But that is not an interpretation of the statute; it is a formula for evading the statute.

B. WHS Claims Discretion That Is Essentially Unlimited.

It is revealing to examine the language in which WHS couches its claims of curriculum relatedness. WHS says that each of the clubs was "intended to further *either* the goals and objectives of specific aspects of the School's *curriculum or of its overall program.*" Brief of Petitioners at 15 (emphasis added). Several of the clubs are said to be "related with the functioning of the School as an institution." *Id.* The curriculum is "part of the 'total learning experience.'" *Id.* at 20. Curriculum includes "all the school-related experiences provided for the growth and development of pupils." *Id.*

The clubs are "part of the School's educational program." *Id.* at 49. Welcome to Westside is a vehicle "for furthering institutional needs." *Id.* at 79. "WHS has an interest" in the work of this club, and "it is surely reasonable" to delegate its work to students instead of staff. *Id.* at 78-79.

Taken together, these formulations equate "curriculum related" with useful. WHS expands "curriculum related" first to "educational," then to the "total learning experience," then to its "overall program," and finally to "school-related." "School-related" is not limited to curriculum, or even to "educational" programs; it includes "institutional needs" as well. Indeed, "school-related" is broad enough to include anything in which the school has "an interest," or anything which is "reasonable." These are no standards at all, and they are not plausible synonyms for "curriculum related." These are labels for letting the school do anything it wants.

Dr. Findlay, the school principal, made this claim more directly in his testimony at trial. For him, the question whether a club is curriculum related is wholly tautological. If it is a club, then it is curriculum related:

> Curriculum to me includes all of our required courses, our elective courses, all the activities and clubs, [and a number of other things as well], but definitely I've always though of activities as part of our curriculum.

J.A. 220 (Tr. 263).

His response to a question about Cheerleaders was even more tautological: [1]

> Q. And what curriculum is it related to?
> A. Activities and clubs.
> Q. I beg your pardon?
> A. Activities and clubs.
> Q. Is it your testimony that Cheerleaders is curriculum-related because it is part of the clubs and activities at Westside High School?
> A. That's right.
> Q. That's the reason it is?
> A. It's part of the curriculum. I think the curriculum at Westside High School includes activities.

J.A. at 222-23 (Tr. at 266).

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[1] Amici do not claim that Cheerleaders alone would trigger application of the Equal Access Act. It may be that cheerleaders are such official spokespersons for their school that they are not a student group at all for purposes of the Act. *See* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 41 (1986) (discussing debate team, school play, and school chorus). The testimony in text is quoted to show Dr. Findlay's all-inclusive definition of curriculum.

This is not the testimony of a school administrator who has considered in good faith how the Equal Access Act applies to his school. Rather, he believes that it is tautologically impossible for the Equal Access Act ever to apply. If a club exists, it is curriculum related, and no matter how many clubs exist, no new club can be created without his permission. The school licenses group speech, and its discretion is absolutely unfettered. That is the school's position. Its lawyers have dressed it up a little in the brief, but they claim a discretion broad enough to let the principal adhere to his own theory.

On most issues of educational policy, WHS does have broad discretion. But on a few issues, where there is an overriding federal policy, the Supremacy Clause requires compliance. This Court has unhesitatingly enforced the law on occasions when Congress directed far greater intrusions into far more central educational decisions. *See, e.g., Honig v. Doe*, 489 U.S. 305 (1988) (refusing to imply a dangerousness exception into the Education of the Handicapped Act). The Equal Access Act is narrower, but it also declares an overriding federal policy. It restricts the school's discretion to exclude student speech and association. For purposes of the Act, this Court must interpret "curriculum related" in a way that serves the Congressional purpose.

C. Discretion Cannot Be Entrusted to WHS, Because WHS Rejects Every Important Premise of the Congressional Policy.

WHS believes that the statute is unconstitutional, wrongheaded, self-contradictory, and bad policy. WHS can hardly be expected to make discretionary judgments that actually implement the statute.

Most obviously, WHS believes that "The Constitution forbids incorporating a religious club into an officially sponsored student activities program." Brief of Petitioners at 81. This is precisely the belief that Congress found objectionable because it discriminated against religious speech.

But the school's rejection of Congressional judgment is not limited to this legal conclusion; it extends as well to every related issue of fact, policy, and characterization. WHS believes that its students are incapable of comprehending that the school does not endorse religion when it allows a religious group to meet. *Id.* at 24, 89. Congress expressly found to the contrary. Senate Report at 10, 34-36.

Congress also found that a school could permit a group to meet without thereby sponsoring the group. Congress expressly provided for meetings at which there would be "no sponsorship of the meeting by the school, the government, or its agents or employees." 20 U.S.C. § 4071(c)(2). WHS believes that such a state of affairs is conceptually impossible—that any group that meets regularly on campus is thereby sponsored by the school. The plaintiff students have asked merely for equal access to a meeting room and to the routine channels of communication within the school. WHS equates this request with a demand for sponsorship. Brief of Petitioners at 13, 82-84.

Congress believed that a policy of equal access could be implemented with faculty sponsors for those groups the school was willing and able to sponsor, and without faculty sponsors for those groups the school was unwilling or unable to sponsor. It expressly provided that the school could not sponsor a religious group; "employees or agents of the school or government" can be "present at religious meetings only in a nonparticipatory capacity." 20 U.S.C. § 4701(c)(3).

WHS rejects this judgment as well. WHS apparently believes that either it must sponsor all groups or no

groups. It claims that if religious clubs can waive a sponsor, so can any other club, including curriculum related clubs, so that its "forum" would be radically restructured. Brief of Petitioners at 54-55.

Amici will respond to some of these arguments later in this brief. The point here is that WHS rejects the Congressional view of the First Amendment, it rejects the Congressional view of student capacity to understand, it rejects the Congressional view of sponsorship, and it rejects the Congressional conception of equal treatment. WHS rejects every aspect of the Congressional policy. Yet it claims unlimited discretion in implementing that policy. This combination is a sure formula for de facto repeal of the statute. If WHS has its way, content discrimination against student speech will continue unimpeded, in the guise of defining what is curriculum related.

Of course this Court defers to local school boards where appropriate. But this Court also defers to Congress. In the face of such fundamental conflict between the judgments of Congress and the judgments of a local school board, this Court cannot defer to both. But the mandate of the Supremacy Clause is clear: Congress's resolution of these questions must prevail.

II. ENFORCEMENT OF THE EQUAL ACCESS ACT AT WHS WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE.

WHS's Establishment Clause argument depends on two legal errors: its refusal to comply with the sponsorship provisions of the Equal Access Act, and its profound misunderstanding of this Court's decisions. WHS would create the latent or passive hostility to religion against which this Court has repeatedly warned. *See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3110 (1989); *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963); *id.* at 295 (Brennan, J., concurring).

It is common ground that WHS cannot sponsor a religion club. To do so would endorse religion in violation

of a long line of decisions from this Court. *See County of Allegheny*, 109 S. Ct. 3086, 3099-3101 (1989). School sponsorship is also objectionable because it would invade the autonomy of the religious club, inevitably influencing choices within the club and changing the religious experience of its members. When government undertakes to direct religious activity, believers as well as nonbelievers are the victims. Thus, amici's disagreement with WHS is not over the permissibility or the desirability of school sponsorship.

Rather, our disagreement is over the meaning of sponsorship, and more fundamentally, over the role of unsponsored groups in a free society. WHS insists that it *must* sponsor every group that meets on campus, and therefore, WHS concludes that it *does* sponsor every group that meets on campus. Because it insists on suppressing everything it does not sponsor, it concludes that mere failure to suppress is sponsorship. Only in this way could WHS repeatedly characterize the plaintiffs' request for permission to meet and to use the routine channels of school communication as a request for sponsorship. Brief of Petitioners 31-32, 83-89, 91.

WHS says that students are free to discuss religion informally, and even to meet informally, *id.* at 6, 13, 51, so it must be sponsorship that the plaintiffs are seeking. But this claim about informal meetings ignores the significance of a critical undisputed fact. Informal meetings could not be "so regular that they were simply a form of club, without faculty sponsorship." *Id.* at 13. A club without faculty sponsorship is exactly what plaintiffs want, and exactly what WHS forbids. The school principal "would not allow any group, not even a checkers club, to meet regularly without official sponsorship." *Id.* at 13.

WHS's Establishment Clause argument thus amounts to a self-imposed Catch-22. Plaintiffs do not want school sponsorship, Congress does not want them to have school sponsorship, the Establishment Clause will not permit them to have school sponsorship, but WHS insists that

they must have school sponsorship and that school sponsorship makes the students' meetings unconstitutional. The Establishment Clause issue is manufactured out of nothing by WHS's insistence that it must sponsor every group that meets on campus.

WHS's rule that no group can meet without official sponsorship is precluded by the Equal Access Act. The Act provides that if the school permits one or more noncurriculum related groups on campus, it must permit other groups to meet as well, 20 U.S.C. § 4071(a) and (b). The Act further provides that WHS cannot sponsor or participate in any religious group. § 4071(c)(2) and (c)(3).[1] It is therefore unnecessary to decide whether WHS's policy of suppressing all it does not sponsor is unconstitutional. WHS can comply with the Act only by permitting plaintiffs' club to meet without sponsorship. If WHS would simply accept this statutory directive, the establishment clause issue would disappear.

An unsponsored religion club presents no serious Establishment Clause issue. Such a club would be wholly voluntary, initiated and run by students. Its speech and activities would be the speech and activities of private citizens, not the speech and activities of government.

Private speech is not converted to government speech simply because it takes place on government property, and this Court has long upheld the rights of religious speakers to speak on public property. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (directing state university to allow religious club to meet on campus); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (permitting religious proselytizing in public airport); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (applying same standards to religious and secular solicitation from booths at state fair); *Poulos v. New Hamp-*

[1] It is not seriously disputed that this is what the statute means. Certain syntactical ambiguities in the literal text are analyzed and explained in Laycock, *supra* note 1, at 42-45.

shire, 345 U.S. 395 (1953) (holding that persons desiring to hold church service in public park may be required to obtain license, where licensing authority acts under reasonable and nondiscriminatory standards); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (protecting church service in public park); *Kunz v. New York*, 340 U.S. 290 (1951) (protecting church service in public street).

These cases were not decided in ignorance of the Establishment Clause implications. The Establishment Clause issue was squarely decided in *Widmar*. It was also briefed in *Niemotko*, see Joint Brief for Appellants at 18-24, Joint Brief for Appellees at 17-20, and it was raised in dissent in *Kunz*, 340 U.S. at 311 n.10 (Jackson, J., dissenting). Opponents of religious speech in the other cases did not find it worthwhile even to argue the Establishment Clause issue.

Nor is it sponsorship for government to recognize that religious speech is occurring or to subject it to nondiscriminatory allocation of space. No one suggested that government's nondiscriminatory allocation of a booth at the state fair in *Heffron*, or of a license to meet in the park in *Poulos*, would be a form of sponsorship that converted private religious speech into a violation of the Establishment Clause. The student request for recognition as a club entitled to use school facilities on an equal basis with other clubs seeks no more. Official recognition is merely a grant of permission to function; it is not sponsorship unless WHS makes it so.

This Court decided the meaning of sponsorship in the context of student organizations in *Healy v. James*, 408 U.S. 169 (1972). *Healy* was not decided under the Establishment Clause, and it involved a university instead of a high school. But the arguments actually presented and decided were quite similar to the arguments here. Plaintiffs in *Healy* sought to have the university officially recognize their chapter of Students for a Democratic Society. As at WHS, official recognition was prerequisite to the right to meet on campus and to use the campus channels

of communication. *Id.* at 176. And like WHS, school officials argued that the students could meet off campus, and even "meet together informally on campus—as individuals, but not as" an organized group. *Id.* at 182-83. Thus, the school concluded, what the students really sought was the "college's stamp of approval," the "administrative seal of official college respectability." *Id.* at 182. This Court unanimously rejected the argument, holding instead that "the College's denial of recognition was a form of prior restraint." *Id.* at 184. The same analysis applies here.

An unsponsored religion club readily meets the three part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The secular purpose of permitting an unsponsored religion club is to implement the constitutional requirement of neutrality—to avoid discriminating against religious speech, and thus to avoid both the appearance and the reality of hostility to religion. When the school permits a wide range of other clubs and forbids a religion club, it sends an unambiguous message of hostility to religion. Just as discrimination in favor of religion would send an improper message of endorsement, discrimination against religion sends an improper message of hostility. Equal access is not endorsement, but unequal exclusion is repudiation.

The primary secular effect of permitting an unsponsored religion club is to implement the secular purpose of neutrality. Because the club would be unsponsored, there would be no religious effect of school endorsement or sponsorship. Interested students would have to seek out the club's meetings; unlike the school-sponsored religious activities that this Court has properly struck down, uninterested students would not be socially pressured to participate in religious observances or displays in their classrooms. *Cf. Stone v. Graham*, 449 U.S. 39 (1980) (display of Ten Commandments on classroom bulletin board); *Abington School District v. Schempp*, 374 U.S. 203 (1968) (teacher-led prayer and Bible reading).

Without a faculty sponsor, there would be no entanglement between state and religion. If the school chooses to send a nonparticipating room monitor on occasion, the monitor's only role is to preserve order. That role is unrelated to the subject matter of the meeting, and unaffected by it. He must enforce the same disciplinary rules he would enforce if the club did not exist, or if it met to discuss philosophy, social studies, or football. The nonparticipating room monitor is not excessively entangled in religion.

WHS offers one final objection to equal access, while insisting that the Court need not decide it. This is the claim that high school students will misunderstand and think that the school sponsors the religion club if it fails to suppress it. Brief of Petitioners at 24, 89-91. This claim that high school students are too "impressionable" to understand free speech and free exercise is inconsistent with the Congressional findings, Senate Report at 10, 34-36, with the testimony of the expert educational psychologist below, J.A. 379-400 (Tr. 540-61), and with the dominant scholarly understanding of human development. Citations to the scholarly literature are collected in Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-09 (1983).

The claim that high school students will misunderstand is also inconsistent with this Court's holding that high school students are mature enough to exercise their rights to free speech in and about the school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court's holdings to the effect that high school students are more impressionable than college students all came in the very different context of government speech. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (teaching of creation science in science courses in public schools); *School District v. Ball*, 473 U.S. 373, 383, 385 (1985) (public school teachers teaching at public expense in parochial schools). These cases assume that high school students are likely to believe what their teachers say, so that government sponsorship of religion is likely to influence them. These cases are irrelevant to the issue here, which is whether high school students can tell the difference between what their teachers and administrators say and what their classmates say.

But most important, WHS's claim that high school students cannot understand is self-defeating. If high school students cannot understand that letting a religion club meet is not sponsorship, then they certainly cannot understand that driving a religion club off campus is not hostility. What students at WHS see now is that their school officials will spend large sums of money and years of litigation to keep a religion club off campus. Whatever motivations exist in the minds of WHS officials are far more difficult to understand than the difference between student speech and official school speech.

The solution to possible student misunderstanding is not to act on the misunderstanding, but to educate those who misunderstand. With appropriate disclaimers and explanations, the school can easily enough make clear that it does not sponsor the religion club. This Court recently held that an explanatory plaque may adequately disclaim government endorsement of religion even when government itself displays religious symbols. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3115 (1989). Some of these amici would not have gone so far. But certainly disclaimers can adequately deal with erroneous attributions to government of private religious speech. WHS would ignore its duty to educate, and instead hold religious speech hostage to the misunderstanding of the least informed or least sophisticated high school student.

Congress correctly judged that voluntary religious clubs can meet without sponsorship. Because WHS rejects even the possibility of an unsponsored club, it asks this Court to hold the Equal Access Act unconstitutional. But the constitutional problem is in WHS's rigidity, not in

the Act. If the Act is enforced as Congress wrote it, the Establishment Clause issue disappears.

III. EXCLUSION OF PLAINTIFFS' CLUB VIOLATES THEIR RIGHTS OF FREE SPEECH, FREE EXERCISE, AND ASSOCIATION.

Because plaintiffs are plainly entitled to prevail on their statutory claim, there is no need to decide their constitutional claims. But even if there were no Equal Access Act, plaintiffs' club would be entitled to meet under the First Amendment.

A. WHS's Policy Violates Plaintiffs' Rights to Speech and Association.

1. *A School Is a Traditional Forum for Its Students and Faculty.*

A school is not a traditional *public* forum, because it is not open to the general public. But neither is it a limited public forum or a nonpublic forum, where speech rights depend wholly on the school board's intention. Rather, a school is a traditional forum for its own students and faculty. As this Court said with respect to university campuses in *Widmar v. Vincent*, and again in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, a campus, "at least as to its students, possesses many of the characteristics of a traditional public forum." *Cornelius*, 473 U.S. 788, 803 (1985), quoting *Widmar*, 454 U.S. 263, 267 n.5 (1981).

Because *Widmar* involved a university campus, the Court's characterization of the forum naturally refers to a university campus. But this characterization of the campus as a traditional forum follows from a long line of cases, many of which involved high schools. This Court has repeatedly held that the "classroom is peculiarly the marketplace of ideas." *Board of Education v. Pico*, 457 U.S. 853, 877 (Blackmun, J., concurring) (1982); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512 (1969). "The vigilant protection of

constitutional freedoms is nowhere more vital than in the community of American schools." *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). *See also, Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 567 (1988) (high school students "cannot be punished for expressing their personal views on the school premises"); *Board of Education v. Pico*, 457 U.S. 858, 864-71 (1982) (plurality opinion).

Schools are one of the traditional places for debate and discussion, just as the streets and parks are one of the traditional places for parades, rallies, and protests. Of course a school is not the same kind of forum as the streets and parks. Rallies and demonstrations that would be entirely appropriate in a park will often be entirely inconsistent with the educational functions of a school. But a school is inherently a forum for the quiet exchange of ideas. That is what is at issue in this case.

The existence of this forum does not depend on the intention of the school officials. School officials can instruct students in the proper means of debate, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and they can control the speech that the school sponsors, such as articles in the official school newspaper, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). But neither of these cases questioned "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms." *Bethel*, 475 U.S. at 681.

WHS denies that it has a traditional *public* forum, relying principally on evidence that the whole public does not have access to the school for purposes of speech. Brief of Petitioners 33-37. It also cites dictum in *Hazelwood* for the proposition that a high school is not a traditional public forum. 108 S. Ct. at 568. But *Hazelwood* is not at all in point. The only forum issue there was "whether *Spectrum* may appropriately be characterized as a forum for public expression." *Id.* at 567 (emphasis added). Spectrum of course was an officially sponsored school newspaper produced for academic credit in a journalism

class. In the context of that forum, it was entirely appropriate to focus on the school's intention to create "a supervised learning experience for journalism students." *Id.* at 569. Here the constitutional forum is the school's buildings and empty classrooms.

WHS assumes, and some of the dictum in *Hazelwood* may be read to assume, that if a school is not a traditional forum for the whole public, then it can be only a limited forum, so that the openness of the forum depends wholly on the school's intent. But the exclusion of the general public does not entail, either as a matter of logic or policy, that the speech rights of the students and faculty be wholly subjected to the will of the school board. *See Laycock, supra* note 1, at 45-51. Restrictions on the persons who have access to the property is a wholly separate issue from restrictions on the speech rights of those who do have access. The three categories of forums recognized in *Cornelius* cannot be understood to have collapsed these two issues into one, because *Cornelius* itself recognized the possibility of a traditional public forum limited to students. 473 U.S. at 803. Nor can *Hazelwood* be understood to have overruled all the earlier cases on the speech rights of students and faculty, because the newspaper at issue there was so unambiguously sponsored by the school.

2. *WHS's Policy Violates Rights of Free Speech and Association Even If the School Is Not Characterized as a Traditional Forum.*

The speech and association issues in this case can also be decided without characterizing the school as a forum. The absence of a forum means restrictions on access: on who can come to the property, or who can publish in the official school paper. But it does not follow merely from the absence of a forum that the school can censor the speech of students who are in a place where they have a right to be. The presence of a forum may create speech rights that did not previously exist, but the absence of a

forum is not a license to censor everyone who has a right to be there. The Court recognized this distinction and held the issue open in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

The students here seek to meet only when the school is open, when they are entitled to be on campus, and when they are not required to be in class. The school recognizes their right to use empty meeting spaces so long as the use is not regular. Brief of Petitioners at 13. Thus, the students seek to speak and to associate for the purpose of group speech in a place where they have a right to be. They seek to speak "on the campus during the authorized hours." *Hazelwood*, 108 S. Ct. at 567, quoting *Tinker*, 393 U.S. at 512-13. The school cannot suppress the exercise of that right except to protect disruption of the educational process, *Tinker*, or to teach a lesson it is entitled to teach, as in *Bethel* and *Hazelwood*.

WHS's suppression of voluntary associations goes much further. School officials claim a monopoly over the initiation of topics for group discussion. No organized group can meet to discuss any topic not sponsored by the school. No organized group can meet to advocate anything. Brief of Petitioners at 11. WHS's insistence that no group can meet without school sponsorship violates the most basic tenets of a free society. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. But that is how WHS regards them.

Apparently recognizing that these policies would be wholly indefensible if applied to individual speech, WHS emphasizes that individual students can discuss whatever they want. Brief of Petitioners at 6, 13, 51. But WHS draws the line at an organized group. It is as though speech were a purely individual right, and this Court had never decided a case on freedom of association.

But of course that is not the law. The right to associate for political and religious speech is fundamental. As Professor Tribe has noted, one can imagine a legal

system in which only individual speech was protected, and association for group speech was a punishable conspiracy, but that is not our system. Laurence Tribe AMERICAN CONSTITUTIONAL LAW 1014 (2d ed. 1988).

The mere fact that the students want to meet as a group does not distinguish this case from other high school free speech cases, such as *Tinker*. As this Court held in *Healy v. James*, 408 U.S. 169, 181-82 (1972), students' right to association includes the right to meet in campus facilities and use the school's channels of communication. And if the school makes those rights dependent on official recognition as a student organization, then the right to association includes the right to official recognition. *Id.*

Here there is no claim that the plaintiffs' club would be disruptive. There is no claim that suppression of plaintiffs' club teaches any valuable lesson. There are only legal claims that misunderstand the law. WHS relies on the Establishment Clause, but the Establishment Clause will not be violated. It relies on its policy of suppressing every group it does not sponsor, but that is simply a negation of the constitutional right of association. Once these legal claims are rejected, there remains no legitimate educational interest in suppressing the plaintiffs' club.

B. WHS's Policy Violates Plaintiffs' Right to Free Exercise of Religion.

Restrictions on religious speech violate the Free Exercise Clause as well as the Free Speech Clause. *Largent v. Texas*, 318 U.S. 418, 422 (1943). This is no mere formalistic redundancy. Religious speech is singled out for special protection in the constitutional text. The Free Exercise Clause makes clear what would otherwise be left to implication: that religious speech is at the very core of the First Amendment, one of the most protected categories of speech. The religious speech at issue here is not minimally protected, like the vulgar speech in

Bethel. Rather, it is maximally protected, like the political speech in *Tinker*.

Similarly, religious association is protected by the Free Exercise Clause. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). Simple meetings of religious groups—meeting in a place where each member of the group has a right to be—cannot be suppressed without some substantial reason. WHS's reasons consist only of its misunderstanding of the Establishment Clause and its unconstitutional desire to sponsor and control every group that meets on campus.

WHS's policy also violates the Free Exercise Clause because it discriminates against religion. Part of the central message of the religion clauses is that government must be neutral toward religion. "Neither sponsorship nor hostility" is permitted. *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970). Discrimination against religion violates the Free Exercise Clause because it evidences hostility. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 142 n.7 (1986).

CONCLUSION

This Court should affirm the judgment of the Court of Appeals on statutory grounds. The Equal Access Act applies and is dispositive; WHS's contrary interpretation would eviscerate the Act.

The Act is constitutional. It requires that WHS allow the plaintiffs' club to meet without sponsorship. Without sponsorship, there is no Establishment Clause issue.

Construing the Act in this way makes it unnecessary to decide plaintiffs' constitutional claims, but those claims are also sufficient to support the judgment below.

Respectfully submitted,

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